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Attorneys for Debtors and Debtors-in-Possession

**UNITED STATES BANKRUPTCY COURT
 DISTRICT OF NEVADA**

In re:
 USA COMMERCIAL MORTGAGE COMPANY,
 Debtor.

Case No. BK-S-06-10725 LBR
 Case No. BK-S-06-10726 LBR
 Case No. BK-S-06-10727 LBR
 Case No. BK-S-06-10728 LBR
 Case No. BK-S-06-10729 LBR

In re:
 USA CAPITAL REALTY ADVISORS, LLC,
 Debtor.

Chapter 11

In re:
 USA CAPITAL DIVERSIFIED TRUST DEED
 FUND, LLC,
 Debtor.

Jointly Administered Under
 Case No. BK-S-06-10725 LBR

In re:
 USA CAPITAL FIRST TRUST DEED FUND,
 LLC,
 Debtor.

**USA COMMERCIAL MORTGAGE
 COMPANY'S OPPOSITION TO
 MOTION FOR ORDER
 TEMPORARILY ALLOWING THE
 CLAIM OF DEL AND ERNESTINE
 BUNCH FOR VOTING PURPOSES**

In re:
 USA SECURITIES, LLC,
 Debtor.

Affects:
☐ All Debtors
☒ USA Commercial Mortgage Company
☐ USA Securities, LLC
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☐ USA Capital First Trust Deed Fund, LLC

Date: December 20, 2006
 Time: 1:30 p.m.

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1 USA Commercial Mortgage Company (“USACM”), by and through its counsel, hereby
 2 files its Opposition to Motion For Order Temporarily Allowing The Claim of Del And Ernestine
 3 Bunch For Voting Purposes (the “Motion”) on the following grounds:

4 USACM has analyzed the Bunches’ Claim and said claim should be disallowed under
 5 section 502(d) of the Bankruptcy Code. The Bunches were recipients of transfers of \$217,000 and
 6 \$196,000 from USACM made to them within 90 days prior to the Petition Dates that are avoidable
 7 under section 547(b) of the Bankruptcy Code as preferential transfers.

8 **FACTS**

9 At his examination under oath on December 19, 2006, Del Bunch admitted that he
 10 received a payment of \$217,000 on February 7, 2006 and a payment of \$196,000 on March 10,
 11 2006 from USACM. The transcript of the 2004 examination with exhibits has been e-filed
 12 separately. See Bunch’s BankWest Nevada statements for February and March, 2006 attached
 13 hereto as **Exhibits K and L**. Because the funds were wire-transferred to his account, Mr. Bunch
 14 was not aware whether the payment came from USACM’s operating account or collection trust
 15 account.

16 **MEMORANDUM OF LAW**

17 Bankruptcy Code § 502(d) provides:

18 (d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow
 19 any claim of any entity from which property is recoverable under section 542, 543,
 20 550, or 553 of this title or that is a transferee of a transfer avoidable under section
 21 522 (f), 522 (h), 544, 545, 547, 548, 549, or 724 (a) of this title, unless such entity
 or transferee has paid the amount, or turned over any such property, for which such
 entity or transferee is liable under section 522 (i), 542, 543, 550, or 553 of this title.

22 Bankruptcy Code § 547(b) allows a debtor in possession to avoid a transfer if –

- 23 (1) to or for the benefit of a creditor;
- 24 (2) for or on account of an antecedent debt owed by the debtor before such transfer
 25 was made;
- 26 (3) made while the debtor was insolvent;
- 27 (4) made—
 - (A) on or within 90 days before the date of the filing of the petition; or
 - (B) between ninety days and one year before the date of the filing of the
 28 petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if—
 - (A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and
 (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

All these elements are present.

- (1) Bunch was a creditor, having loaned USACM \$10,000,000;
- (2) Payment was made for interest on the loan;
- (3) USACM was and is very insolvent. Such insolvency is presumed under § 547(f);
- (4) Payments of \$217,000 and \$196,000 were made within 90 days of the filing of USACM's Chapter 11 petition; and
- (5) Bunch received payment on an unsecured claim which may never get paid in a Chapter 7 liquidation of USACM. To determine whether a payment improved a creditor's position, the trustee must demonstrate that there were other unsecured creditors in the same class and that these unsecured creditors would receive less than one-hundred percent of their claims. See 11 U.S.C. § 547(b)(5), (g); *Elliott v. Frontier Properties/LP (In re Lewis W. Shurtleff, Inc.)*, 778 F.2d 1416, 1421 (9th Cir.1986) ("[A]s long as the distribution in bankruptcy is less than one-hundred percent, any payment 'on account' to an unsecured creditor during the preference period will enable that creditor to receive more than he would have received in liquidation had the payment not been made."). The documentation contained in the Disclosure Statement, with its liquidation analysis (Exhibit 4), provide clear evidence that in this case the distribution to unsecured creditors of USACM will not be "one-hundred percent". See also, *In re Powerine Oil Co.*, 59 F.3d 969, 972 (9th Cir. 1995).

Bunch may argue that he received his payments in the ordinary course of business and, therefore, has a defense under § 547(c)(2). Bunch would have to prove:

- (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
- (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; **and**
- (C) made according to ordinary business terms;

1 Bunch has the burden of proof on each of these elements. See § 547(g). To this point in
 2 time, Bunch has not presented any supporting evidence in support of this “ordinary course”
 3 defense. It is unlikely that he would be able to do so because his promissory note was (a) in
 4 default for being over a year past due and he was receiving default interest at the rate of 24% per
 5 annum (twice the rate that USACM was loaning money to developers) plus a 5% of principal
 6 (\$525,000) late charge. To prove his defense, Bunch would have to show that mortgage lending
 7 companies *ordinarily* borrow on these terms.

8 Bunch may argue that § 502(d) is inapplicable because USACM has not brought an
 9 avoidance action under § 547. This argument is defeated by the precedents of *In re America West*
 10 *Airlines, Inc.*, 217 F.3d 1161, 1167 (9th Cir. 2000), and *In re KF Dairies, Inc.*, 143 B.R. 734 (9th
 11 Cir.BAP 1992). These cases hold that even a preference for which an action is time-barred may
 12 be grounds for disallowance of a claim under § 502(d).

13 There is no reason why the Bunch claim cannot be estimated at \$0. *In re Frontier Airlines,*
 14 *Inc.*, 137 B.R. 811, 814 (D.Colo.1992) (estimation under § 502(c) may result in an estimation of a
 15 claim at zero). In *In re Corey*, 892 F.2d 829, 834 (9th Cir. 1989), the Court of Appeals approved
 16 the estimation of a claim held by creditors who voted to reject the proposed plan at zero for
 17 purposes of confirming a plan. It held:

18 Appellants contend that the Louis's plan for reorganization should have
 19 been deemed rejected because Ellis, Ryan and the Ellis-controlled entities, claiming
 20 in excess of one million dollars against the Corey estate, voted against the plan.
 21 Appellants' claims included unliquidated sums for “emotional distress,” “paralegal
 22 services” and “lost rent” on the Silversword Inn. The Louis's claims against the
 23 estate, by comparison, were approximately \$700,000. Thus, if appellants' claims
 24 were valid, their votes against confirmation of the plan would have been sufficient
 25 to defeat it, *see* 11 U.S.C. §§ 1126(a), 1129(a) (1988), or at least force the court to
 26 use the “cram down” provisions of 11 U.S.C. § 1129(b) (1988).

27 The district court, however, did not consider appellants' votes because it had
 28 estimated their claims against the Corey estate to be zero. Under 11 U.S.C. §
 502(c)(1) (1988), a court shall estimate any contingent or unliquidated claims
 against the estate that “would unduly delay the administration of the case.” Given
 the highly speculative nature of appellants' claims, the district court correctly found
 estimation to be appropriate. Otherwise, the confirmation of the Louis's plan would
 have been unduly delayed to the detriment of Corey and her real creditors.

**A court has broad discretion when estimating the value of an
 unliquidated claim. *Addison v. Langston (In re Brints Cotton Mktg., Inc.)*, 737**

1 F.2d 1338, 1341 (5th Cir.1984); *Bittner v. Borne Chem. Co.*, 691 F.2d 134, 136 (3d
2 Cir.1982).

3 *Id.* at 834.

4 “[§ 502(d)] requires disallowance of a claim of a transferee of a voidable transfer
5 *in toto* if the transferee has not paid the amount or turned over the property received
6 as required under the sections under which the transferee's liability arises”.
(emphasis added)

7 House Report No. 95-595, 95th Cong., 1st Sess. 354 (1977); Senate Report No. 95-989, 95th
8 Cong., 2d Sess. 65 (1978), U.S.Code Cong. & Admin.News 1978, pp. 5787, 5851, 6310.

9 In *In re Coral Petroleum, Inc.*, 60 B.R. 377 (Bankr. S.D.Tex. 1986), the Bankruptcy Court
10 disallowed for voting purposes the claims of creditors who had received preferential transfers.

11 The Bankruptcy Court held:

12 Envisaging the possibility that the Pipeline Defendants could defeat the preference
13 actions and never have a claim against the estate demonstrates the need for
14 disallowance of their claims for voting purposes. Otherwise, the Plan could be
15 defeated by those who never ultimately acquire an economic interest in its
outcome.

15 ***

16 The temporary allowance of these claims would frustrate the purpose of the voting
17 requirements in the Code, which is to protect the rights of legitimate creditors to
18 determine the outcome of the plan. The express language of the Code rather than a
19 consideration of the equities of the situation is the determining factor in this case.
Congress has clearly provided in section 502(d) that the claims may not be allowed
unless and until the preferences have been turned over to the estate.

20 Denying the Pipeline Defendants their preference related vote causes them no
21 actual prejudice in distribution after they have turned over the preferential transfers
to the estate. They will be entitled to distribution after and to the extent such funds
have been returned to the estate.

22 *Id.* at 383.

23 This rule was followed in *In re American Solar King Corp.*, 90 B.R. 808, 828 Bankr.
24 W.D.Tex. 1988), which held:

25 The targets of a preference action do not hold claims against the estate for voting
26 purposes "unless such entity or transferee has paid the amount, or turned over such
27 property, for which such entity or transferee is liable under section 522(i), 542, 543,
550, or 553 of this title." 11 U.S.C. § 502(d); *In re Coral Petroleum*, 60 B.R. 377
(Bankr. S.D. Tex. 1986). *see In re Amarex, Inc.*, 61 B.R. 301
28 (Bankr.W.D.Okla.1985). In *Coral Petroleum* the court observed that, because
claims arising from a preference are expressly disallowed under Section 502(d),
and because only allowed claims may vote on a plan, the targets of actions to

1 recover preferential transfers may participate in the balloting only after they have
 2 surrendered the preference to the estate. *In re Coral Petroleum, Inc.*, *supra* at 382
 3 (criticizing *Amarex* ' reliance on equitable principles which contravene the express
 4 language of the statute). These parties have not yet surrendered the preference
 5 sought to be recovered by the debtor. They do not therefore hold allowed claims
 6 against the estate. Their votes must therefore be disregarded. 11 U.S.C. § 1126(a);
 7 Bankr.R. 3018.

8 *In re Sierra-Cal*, 210 B.R. 168, 174 (Bankr. E.D.Cal. 1997) (footnote 13), noted:

9 Courts have held that the § 502(d) disability can be enforced to preclude a creditor
 10 from accepting or rejecting a plan pursuant to 11 U.S.C. § 1126.

11 CONCLUSION

12 Based upon the facts that that show a prima facie case for a avoiding the February and
 13 March, 2006 payments to Bunch as § 547 preferences, the lack of a defense and the clear mandate
 14 of § 502(d) to disallow claims of persons who received preferences, this Court should find that
 15 Bunch's claim will be disallowed and should be estimated to be \$0.

16 /s/ Lenard E. Schwartz

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ACCOUNT:
DOCUMENTS:

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02/28/2006

DEL M BUNCH JR
DBA LOAN PARTNERS CAPITAL
10137 SNOW CREST PL
LAS VEGAS NV 89134-2563

Handwritten signature and "OK" mark

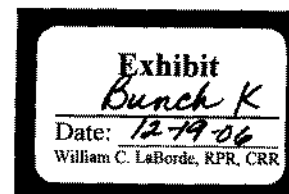
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BUSINESS PREMIUM NOW ACCOUNT 120028700

DESCRIPTION	DEBITS	CREDITS	DATE	BALANCE
BALANCE LAST STATEMENT			01/31/06	49,381.90
CHECK # 11529	2,355.00		02/01/06	47,026.80
CYD D ALLRED EXTRL XFER XXXXX8700		250.00	02/02/06	47,276.80
CHECK # 11545	13.00		02/02/06	47,263.80
DEPOSIT		1,166.67	02/06/06	48,430.47
INTEGRATED FINAN LOAN PMT. 625		3,437.50	02/06/06	51,867.97
CONSOLIDATED MOR ACH XFER		3,999.99	02/07/06	55,867.96
CHECK # 11546	23,000.00		02/08/06	32,867.96
USA Capital Payments 0000000950		217,000.00	02/09/06	249,867.96
DEPOSIT		4,604.16	02/10/06	254,472.12
Nimble Invest		2,000.00	02/10/06	256,472.12
Glendale		7,266.67	02/10/06	263,738.79
CHECK # 11550	2,500.00		02/10/06	261,238.79
CHECK # 11553	3,000.00		02/13/06	258,238.79
CHECK # 11555	4,800.00		02/13/06	253,438.79
CHECK # 11557	5,200.00		02/13/06	248,238.79
CHECK # 11549	17,500.00		02/13/06	230,738.79
CHECK # 11554	5,125.00		02/14/06	225,613.79
CHECK # 11556	86.59		02/15/06	225,527.20
CHECK # 11548	3,000.00		02/16/06	222,527.20
CHECK # 11551	22,000.00		02/21/06	200,527.20
CHECK # 11558	43.92		02/28/06	200,483.28
INTEREST AT .30 %		39.41	02/28/06	200,522.69
BALANCE THIS STATEMENT			02/28/06	200,522.69
TOTAL CREDITS (9)		239,764.40		
TOTAL DEBITS (13)		88,623.51		

* * * C O N T I N U E D * * *





BOF AMERICA
175 STEVENSON, NEWARK, NEW JERSEY
(702) 948-8300

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ACCOUNT:

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LAS VEGAS NV 89134-2563

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Handwritten signature: Z. Lee
Handwritten initials: OK

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BUSINESS PREMIUM NOW ACCOUNT 120028700

DESCRIPTION	DEBITS	CREDITS	DATE	BALANCE
BALANCE LAST STATEMENT			02/28/06	200,522.69
CONSOLIDATED MOR ACH XFER		3,066.66	03/01/06	203,589.35
CHECK # 11552	3,000.00		03/02/06	200,589.35
DEPOSIT		105,770.83	03/03/06	306,360.18
DEPOSIT		2,500.00	03/06/06	308,860.18
INTEGRATED FINAN LOAN PMT. 625		3,437.50	03/06/06	312,297.68
CHECK # 11569	1,289.00		03/07/06	311,008.68
CHECK # 11547	1,354.00		03/07/06	309,654.68
DEPOSIT		300,000.00	03/08/06	609,654.68
CHECK # 11559	64.14		03/08/06	609,590.54
CHECK # 11562	17,500.00		03/08/06	592,090.54
Nimble Invest		2,000.00	03/09/06	594,090.54
Glendale		7,266.67	03/09/06	601,357.21
CHECK # 11563	2,500.00		03/09/06	598,857.21
CHECK # 11567	5,125.00		03/09/06	593,732.21
CHECK # 11560	239.67		03/10/06	593,492.54
CHECK # 11572	300,000.00		03/10/06	293,492.54
USA Capital Payments 0000000950		196,000.00	03/13/06	489,492.54
CHECK # 11566	3,000.00		03/13/06	486,492.54
CHECK # 11568	10,800.00		03/13/06	475,692.54
CHECK # 11573	220,000.00		03/13/06	255,692.54
CHECK # 11561	3,000.00		03/14/06	252,692.54
CHECK # 11565	3,000.00		03/14/06	249,692.54
CHECK # 11564	22,000.00		03/14/06	227,692.54
CHECK # 11571	89.23		03/15/06	227,603.31
CHECK # 11574	266.00		03/15/06	227,337.31
CHECK # 11575	5,500.00		03/16/06	221,837.31
CHECK # 11577	43.85		03/21/06	221,793.46
CHECK # 11576	200,000.00		03/22/06	21,793.46
CHECK # 11578	8,745.00		03/23/06	13,048.46

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